Introductory note to Bédat v Switzerland

INTRODUCTORY NOTE TO BÉDAT V. SWITZERLAND (EUR. CT. H.R.) BY DIMITRIOS KAGIAROS*

[March 29, 2016]
+Cite as 55 ILM XXX (2016)+

Introduction

With *Bédat v Switzerland*,[1] the Grand Chamber of the European Court of Human Rights adds to its case law on the limits of free speech protection for journalists. The judgment, which reverses a previous Chamber judgment,[2] is noteworthy for three reasons. Firstly, it provides further insight into the concept of "responsible journalism" that the Court increasingly relies on when examining cases relating to press freedoms. Secondly, in balancing free speech with the right to privacy, the Grand Chamber clarifies which types of published information cannot be deemed to contribute to the public interest. Finally, the Grand Chamber asserts that the obligation on contracting parties to the European Convention on Human Rights (ECHR) to uphold the presumption of innocence of defendants before trial may also require them to limit press freedoms whenever the latter pose a risk to the former.

Facts

The applicant was a journalist who published an article that included information on ongoing criminal proceedings against a motorist involved in a tragic road accident. The accident had caused controversy and heated debate in Switzerland. The journalist came across the information in a rather unorthodox manner: a third party claiming damages in the proceedings had lost a copy of the case file at a shopping centre, and this copy was then mailed to the applicant's office.

In the impugned article, the journalist shared a summary of questions put to the motorist during his interrogation by the police and the investigating judge, along with statements from his wife and doctor. While the article did not include any explicit or implicit assessments on his guilt or innocence, its tone was hostile to the defendant, with headlines such as "He lost his marbles" or "The reckless driver's version." After the journalist was fined, he applied to the Court alleging that this violated his right to free speech. While the Second Section of the Court found that the fine was in breach of the journalist's free speech rights, the Grand Chamber overturned the Second Section's judgment and found that no violation had occurred.

Responsible Journalism as a Precondition of Free Speech Protection

The Grand Chamber began its proportionality assessment by referring to the concept of responsible journalism. Building on recent judgments,[3] the Court stated that free speech protection is available to journalists "subject to the proviso that they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism."[4] According to the Court, "the concept of responsible journalism also embraces the lawfulness of the conduct of a journalist, and the fact that a journalist has breached the

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law is a relevant, albeit not decisive, consideration when determining whether he or she has acted responsibly."[5] Based on this, the Court attached particular weight to the fact that the applicant should have been aware of the confidential nature of the information and the fact that its publication would breach the Swiss Criminal Code.

Bédat joins a series of judgments from 2016[6] in which the Court found no infringement of journalists' free speech rights in cases relating to "illegal preparatory acts of newsgathering."[7] Thus, the overall lawfulness of the journalist's conduct factors heavily into the Court's reasoning on the protection he or she can expect under freedom of expression. However, the Court clarifies that the legality of the journalist's conduct is not the decisive factor in the proportionality exercise. This is to acknowledge that when breaking the law is a prerequisite for the journalist to access information, the publication of which is in the public interest, this illegality will not undermine the journalist's claims under freedom of expression. The crucial element of the proportionality exercise is, therefore, the public interest in the published information. However, as will be explained in the section below, the *Bédat* case reveals some disagreement among the Court's judges as to the factors that inform the assessment of whether information was in the public interest.

Privacy Versus Expression: Defining the Public Interest

In examining the harm the article caused to the reputation of the defendant, the Court reiterated that contracting parties to the ECHR have a positive obligation to protect the reputation of citizens under the right to respect for one's private and family life. How should this duty be balanced against free speech? The Court has approached this matter from the starting point that privacy and freedom of expression enjoy an equal status under the Convention.[8] Therefore, the Court does not recognize that one automatically has primacy over the other. Instead, the focus is placed on determining whether the public interest in publication of the information outweighed the duty to protect the individual's privacy.[9] In the Second Section judgment, the Court placed emphasis on the fact that the accident was a matter of great national concern. Thus, it reached the conclusion that by providing insight into what led to the tragedy, the impugned article informed the public interest. This approach was contested by the respondent government in its arguments before the Grand Chamber. The Grand Chamber paid heed to the government's concerns and found that the information published by the applicant was "highly personal, and even medical, in nature, including statements by the accused person's doctor as well as letters sent by the accused from his place of detention."[10] This information according to the Grand Chamber, could at the very most satisfy "an unhealthy curiosity," rather than contribute to the public interest.[11] This led the Court to adopt the view that the type of information disclosed about the defendant called for "the highest level of protection" under the right to privacy.[12]

The case highlights the existence of some disagreement between the Second Section and Grand Chamber as to the appropriate assessment of the public interest. In the Second Section judgment, the Court cautioned that a restriction on press freedom must not be passed down before ensuring "that the penalty does not amount to a form of censorship tending to discourage the press from making criticisms."[13] The Court went on to stress that sanctions to journalists are "liable to hamper the media in performing their task as a purveyor of

information and public watchdog."[14] The Grand Chamber, while acknowledging that the article related to a matter of public interest, ultimately concluded that this interest was undermined by the tone of the article and the nature of the disclosed information. This approach may be difficult to square with the Court's previous case law. The Court has held that it suffices for a piece of journalism to be perceived as being *capable* of contributing to the public interest, regardless of whether it does so successfully.[15] In *Bédat*, the Grand Chamber avoided establishing clear criteria as to how the public interest should be assessed in such sensitive cases, and instead referred to the domestic judgment of the Swiss Federal Court on the matter which, per the Grand Chamber, "contained no hint of arbitrariness" in its assessment of the public interest.[16]

Fair Trial Versus Expression

In *Bédat*, the Court also relied on the state's positive obligation to protect the defendant's presumption of innocence to argue that the restriction imposed on the journalist was proportionate. The Grand Chamber focused on the *risk* the impugned article posed to the fairness of trial rather than on its actual impact. The Second Section judgment had taken the opposite approach. For the Second Section, the negative impact of the article to the presumption of innocence was mitigated by the fact that the trial took place two years after the article was published and professional judges, rather than a jury, were involved. This analysis of the impugned article's impact 'after the fact' was rejected by the Grand Chamber. Regardless of the eventual outcome of the trial, the emphasis according to the Grand Chamber should be placed on the risk the article posed to a fair trial by examining the conditions at the time of its publication.

The balancing exercise between free speech and fair trial is a significant addition to the Court's handling of such cases. It seems that the duty of the state to uphold the presumption of innocence goes beyond merely ensuring that adequate safeguards to this effect exist in the judicial system. After *Bédat*, this duty also requires the state to make use of all the means at its disposal to minimize broader threats to this presumption, even if this entails limiting press freedoms on occasion. As the impugned article did not make reference to the defendant's guilt or innocence, it can be deduced that an article that discloses confidential information that paints a highly negative picture of the defendant will suffice to trigger the state's duty to intervene and protect the fairness of an impending trial. A risk to the presumption of innocence suffices, as no actual impact needs to be demonstrated. However, further judgments are required to clarify the exact scope of the obligation and the types of negative coverage that would be permitted.

Conclusion

Bédat makes for an interesting addition to the Court's free speech case law. It clarifies that journalists are not above the law[17] when discharging their duties as "public watchdogs." It illustrates that negative coverage of a defendant before a trial engages both the defendant's privacy and fair trial rights. Striking the appropriate balance will rely on whether the journalist can make a credible case that the information published informed the public interest successfully.

[1] Bédat v. Switzerland, 2016-IV Eur. Ct. H.R. 730 [hereinafter Judgment].
[2] A.B. v. Switzerland, Eur. Ct. H.R. (2014), http://hudoc.echr.coe.int/eng?i=001-145457 [hereinafter A.B.].
[3] *See infra*, note 6.
[4] Judgment, *supra* note 1, ¶ 50.
[5] *Id.*
[6] Rusu v. Romania, Eur. Ct. H.R. (2016), Brambilla v. Italy, Eur. Ct. H.R. (2016), Salihu v. Sweden, Decision on Admissibility, Eur. Ct. H.R. (2016), Erdtmann v. Germany, Decision on Admissibility, Eur. Ct. H.R. (2016).
[7] Dirk Voorhoof, *Guest Post: Grand Chamber Judgment Bédat v Switzerland*, ECHR BLOG (November 23, 2016, 12:22 PM), http://echrblog.blogspot.co.uk/2016/04/guest-post-grand-chamber-judgment-bedat.html.
[8] See Von Hannover v Germany (No. 2), 2012-I Eur. Ct. H.R. 399.
[9] See also Axel Springer AG v. Germany, no. 39954/08 (ECHR 2 February 2012) and Stoll v. Switzerland, 2007-V Eur. Ct. H.R. 267.
[10] Judgment, *supra* note 1, ¶ 76.
[11] *Id*. ¶ 65.
[12] *Id.* ¶ 76.
[13] A.B., *supra* note 2, ¶ 60.
[14] *Id.*
[15] Haldimann v. Switzerland, Eur. Ct. H.R. ¶ 57 (2014); Voorhoof, *supra* note 7.
[16] Judgment, *supra* note 1, ¶ 65.
[17] Voorhoof, *supra* note 7.